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NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

TRANSOIL (JERSEY) LTD. AND
TRANSOIL (U.S.A.), INC.,
Petitioners

v.

REX OIL, LTD. AND EMPIRE PETROLEUM
INTERNATIONAL, INC.,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the United States Court of Appeals for the Fifth Circuit erred in holding that a settlement agreement reached in district court to amend a sales contract which had the incidental effect of releasing a vessel was a maritime contract which created maritime jurisdiction in the district court where none had previously existed.

2. Whether the United States Court of Appeals for the Fifth Circuit erred in holding that the oral pronouncements made by Judge Sterling in open court at the conclusion of the case were sufficient findings of fact and conclusions of law pursuant to Federal Rule of Civil Procedure 52(a) to allow Judge Singleton to enter judgment on those findings of fact and conclusions of law.

3. Whether the United States Court of Appeals for the Fifth Circuit erred in holding that, pursuant to Rule 63, Federal Rules of Civil Procedure, District Judge John V. Singleton, properly entered judgment after the death of Judge Ross Sterling when no findings of fact and conclusions of law had been filed.

PARTIES TO THE PROCEEDING

1. Rex Oil, Ltd. — Plaintiff.

2. Empire Petroleum International, Inc. — Plaintiff.

3. Transoil (Jersey) Ltd. — Defendant.

4. Transoil USA, Inc. — Defendant.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	I
PARTIES TO THE PROCEEDING	II
TABLE OF CONTENTS	III
TABLE OF AUTHORITIES	V
REFERENCE TO OPINION BELOW	1
GROUNDS FOR JURISDICTION	1
STATUTORY OR CONSTITUTIONAL PROVISIONS APPLICABLE	2
STATEMENT OF THE CASE	3
ARGUMENT	5
I. The Court of Appeals erred in holding that admiralty jurisdiction is created when the parties to a sales contract amend or modify their contract, and as an incident thereof, a vessel loaded with the cargo that is the subject matter of the contract is able to re-enter navigation.	5
II. When a presiding judge in a non-jury trial makes various oral pronouncements in court, states that he needs to and will file findings of fact and conclusions of law, and then passes away prior to making those findings of fact and conclusions of law, it is error for a successor judge to enter judgment.	11
A. Judge Sterling's oral pronouncements are insufficient to constitute findings of fact and conclusions of law.	11
B. The District Court erred in entering judgment because there were inadequate findings of fact and conclusions of law to meet the requirements of Rule 63 of the Federal Rules of Civil Procedure.	13
CERTIFICATE OF SERVICE	17

	Page
APPENDIX A — Opinion of Fifth Circuit dated May 19, 1989	1a
APPENDIX B — Order of Fifth Circuit Denying Motion for Rehearing dated June 22, 1989	15a
APPENDIX C — Order of District Court Denying Motion for New Trial dated April 15, 1988	16a
APPENDIX D — Final Judgment of District Court dated February 4, 1988	17a
APPENDIX E — Transcript of Proceedings in District Court dated June 18, 1987	19a
APPENDIX F — Agreed Order in District Court dated February 21, 1986	42a
APPENDIX G — Warrant of Seizure dated January 9, 1986	46a
APPENDIX H — Complaint in District Court dated January 9, 1986	48a

TABLE OF AUTHORITIES

CASES

Arrow Hart, Inc. v. Philip Carey Co., 552 F.2d 711 (6th Cir. 1977) 15
Backar v. Western States Producing Co., 547 F.2d 876 (5th Cir. 1977) 9
Brennan v. Grisso, 198 F.2d 532 (D.C. Cir. 1952) 15
Chapman v. Orange Rice Mining Co., 747 F.2d 981 (5th Cir. 1984) 9
Chi Shun Hua Steel Co., Ltd. v. Crest Tankers, Inc., 708 F.Supp. 18 (D. N.H. 1989) 7
Consolidated Bathurst v. Rederiaktiebolaget Gustaf Erikson, 645 F.Supp. 884 (S.D. Fla. 1986) 8
Denofre v. Transportation Ins. Rating Bureau, 532 F.2d 43 (7th Cir. 1976) 13
The Eclipse, 135 U.S. 599, 34 L.Ed. 269 (1890) 7
Emerson Elec. Co. v. General Elec. Co., 846 F.2d 1324 (11th Cir. 1988) 16
Fluor Corp. v. United States ex rel. Mosher Steel Corp., 405 F.2d 823 (9th Cir.), *cert. denied*, 394 U.S. 1014 (1969) 12
Grover Hill Grain Co. v. Baughman-Oster, Inc., 728 F.2d 784 (6th Cir. 1984) 13
Henry A. Knott Co. v. Chesapeake & Potomac Tel. Co., 772 F.2d 78 (4th Cir. 1985) 14, 15
Hinkins Steamship Agency v. Freighters, Inc., 498 F.2d 411 (9th Cir 1974) 7, 8
Home Placement Service v. Providence Journal Co., 819 F.2d 1199 (1st Cir. 1987) 16
Hunt v. A Cargo of Petroleum Products Laden on the S/T Hilda, 378 F.Supp. 701 (E.D. Pa. 1974), *aff'd*, 515 F.2d 506 (3d Cir.), *cert. denied*, 423 U.S. 869 (1975) 8, 9
Jackson v. Seaboard Coast Line Railroad Co., 678 F.2d 992 (11th Cir. 1982) (citing *People's Bank v. Calhoun*, 102 U.S. 256 (1880)) 7
Kossick v. United Fruit Co., 365 U.S. 731 (1961) 7
Laredo Offshore Constructors, Inc. v. Hunt Oil Co., 754 F.2d 1223 (5th Cir. 1985) 8
Lopez v. Current Director of Texas Economic Development Commission, 807 F.2d 430 (5th Cir. 1987) 12
Natasha, Inc. v. Evita Marine Charters, Inc., 763 F.2d 468 (1st Cir. 1985) 7
Otero v. Mesa County Valley School Dist. No. 51, 568 F.2d 1312 (10th Cir. 1977) 13

CASES

	Page
Pierside Terminal Operators, Inc. v. M/V Floridian, 423 F.Supp. 962 (E.D. Va. 1976)	8
Richard Bertram & Co. v. Yacht Wanda, 447 F.2d 966 (5th Cir. 1971)	7, 9
Self v. Great Lakes Dredge & Dock Co., 832 F.2d 1540 (11th Cir. 1987), *cert. denied*, 108 S. Ct. 2017 (1988)	13
Theriot v. Bay Drilling Corp., 783 F.2d 527 (5th Cir. 1986)	7, 8
Thompson v. Sawyer, 678 F.2d 257 (D.C. Cir. 1982)	15
Thurmond v. Delta Well Surveyors, 836 F.2d 952 (5th Cir. 1988)	8
Townsend v. Gray Line Bus Co., 767 F.2d 11 (1st Cir. 1985)	14, 16
Tropwood A.G. v. Tae Chang Wood Industry Co., Ltd., 454 F.Supp. 964 (N.D. Ill. 1978)	8
Vreeland v. Federal Power Commission, 523 F.2d 1343 (5th Cir. 1976)	9
Weinstein v. Eastern Air Lines, 316 F.2d 758 (3d Cir.), *cert. denied*, 375 U.S. 940 (1963)	8
Whalen v. Ford Motor Credit Co., 684 F.2d 272 (4th Cir.) (en banc), *cert. denied*, 459 U.S. 910 (1982)	14

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REFERENCE TO OPINION BELOW

This case is reported at 873 F.2d 82 (5th Cir. 1989) and is reproduced in the Appendix.

GROUNDS FOR JURISDICTION

The judgment appealed from was rendered by the Fifth Circuit on May 19, 1989. Appellant's Petition for Rehearing was denied by order dated June 22, 1989, which is reproduced in the Appendix. The jurisdictional authority for this court to review the judgment by writ of certiorari is contained in 28 U.S.C. Section 1254(1).

STATUTORY OR CONSTITUTIONAL PROVISIONS APPLICABLE

The following provisions are applicable to this case:

1. 28 U.S.C. § 1333(1)

   "The district courts shall have original jurisdiction, exclusive of the courts of the states, of:

   (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

2. Federal Rule of Civil Procedure 63, providing in relevant part:

   "If by reason of death, sickness or other disability, a judge before whom an action has been tried is unable to perform the duties to be performed by the court under these rules after a verdict is returned or findings of fact and conclusions of law are filed, then any judge regularly sitting in or assigned to the court in which the action was tried may perform those duties . . ."

3. Federal Rules of Civil Procedure 52(a), stating in pertinent part:

   "In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately conclusions of law thereon, and judgment shall be entered pursuant to Rule 58 . . . it will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court . . ."

STATEMENT OF THE CASE

On or about November 25, 1985, Plaintiff Empire Petroleum International, Inc. ("Empire") (Respondent herein) and Defendant Transoil U.S.A., Inc. ("Transoil USA") (Petitioner) entered into a contract under the terms of which Empire was to sell to Transoil USA approximately 80,000 barrels of distillate blend stock, later called luwa distillate. The contract of sale was subsequently amended.

In January, 1986, Transoil nominated the M/V JACINTH to take delivery of the distillate that it was purchasing from Empire at the Paktank terminal in Houston. The JACINTH could only load part of the cargo. Empire requested that the cargo be unloaded and Transoil refused.

Plaintiffs, Rex Oil Ltd. and Empire Petroleum International, Inc., filed their Original Complaint on January 9, 1986, naming as Defendants the M/V JACINTH, A/S Kosmos, Paktank Corporation, Arco Chemical Company, Transoil (Jersey) Ltd. and Transoil USA, Inc., in the United States District Court for the Southern District of Texas, Houston Division. (Plaintiffs' Original Complaint is reproduced in the Appendix). Judge Ross N. Sterling was assigned the case. Plaintiffs invoked the admiralty and maritime jurisdiction of the court. In their complaint, Plaintiffs alleged that they were the owners of 80,000 barrels of "oil" which was either loaded aboard a ship, the M/V JACINTH, or in shore tanks No. 728 and/or 735 at the Paktank Corporation terminal in Houston. Plaintiffs alleged that the defendants were refusing to deliver to Plaintiffs the 80,000 barrels of oil and documents of title relating to the cargo. Plaintiffs characterized defendants' conduct as "breach of contract,

breach of bailment, intentional tortious conversion, intentional tortious interference with other contracts of Plaintiffs." Plaintiffs sought to recover damages in the amount of $1,500,000.00. Plaintiffs sought and received a Writ of Seizure, purportedly a Rule D attachment under the Supplementary Admiralty Rules, issued by the clerk of the court for the 80,000 barrels of oil and the ocean bills of lading or warehouse receipts for the cargo. The Writ of Seizure was served on the Master of the M/V JACINTH on January 9, 1986. The M/V JACINTH was never served with a writ.

On January 10, 1986, certain of the parties to the action reached an agreement concerning an amendment of the sales agreement between Transoil (USA), Inc. and Empire. An incidental aspect of the agreement was the release of the seizure of the particular cargo seized on January 9, 1986. This agreement was reduced to writing in an Agreed Order, which was not signed by Judge Sterling until February 21, 1986. (The Agreed Order is reproduced in the Appendix).

Plaintiffs amended their complaint, alleging that Defendants had breached their agreement contained in the Agreed Order by subsequently failing to take delivery of the product or pay based on warehouse receipts. Plaintiffs proceeded to trial against only Transoil (Jersey) Ltd. and Transoil U.S.A., Inc. only before Judge Ross Sterling in a non-jury trial on April 8 and 10, 1987. Defendants had raised the defense of lack of subject matter jurisdiction. The Court held a status conference on May 18, 1987 and additional arguments on June 18, 1987. Judge Sterling had requested post trial briefing on the subject matter jurisdiction issue, which Defendants raised again at trial. Both Plaintiff and Defendant filed post trial memoranda concerning subject matter juris-

diction. At the hearing on June 18, 1987, the Court determined that it had subject matter jurisdiction based on a maritime contract, that the Defendant breached the agreement of January 10, 1986, and the judgment would be entered in favor of Plaintiff. (The Transcript of that hearing is reproduced in the Appendix). At the hearing, the Judge indicated that he would have to enter detailed findings of fact and conclusions of law. Almost eight months later, in January, 1988, before he made such findings of fact and conclusions of law, Judge Sterling died. Sua sponte, Judge John V. Singleton, Jr., entered judgment against both Defendants on February 4, 1988, in the amount of $702,400.00, plus pre-judgment interest and post-judgment interest. Defendants filed a Motion for New Trial, which was denied.

Defendants perfected their appeal to the United States Court of Appeals for the Fifth Circuit. By Opinion dated May 19, 1989, the Fifth Circuit concluded that the district court did have subject matter jurisdiction of the case and that Judge Singleton properly entered final judgment because Judge Sterling's oral pronouncements in court were sufficient findings of fact and conclusions of law to satisfy Rule 52(a).

ARGUMENT

I. The Court of Appeals erred in holding that admiralty jurisdiction is created when the parties to a sales contract amend or modify their contract, and as an incident thereof, a vessel loaded with the cargo that is the subject matter of the contract is able to re-enter navigation.

It is Petitioners' position that the district court lacked subject matter jurisdiction over this dispute. The parties had originally entered into a sales agreement relating to

a distillate product. An incidental aspect of the sales agreements was that delivery could be taken by vessel. When a dispute arose concerning a particular parcel of the product under the sales agreement, some of which was in shore tanks, and some of which was loaded aboard the M/V JACINTH, Plaintiffs filed suit allegedly invoking the court's maritime jurisdiction. Although the ship was named as a Defendant, it was never served. A writ of attachment under Rule D of the Supplemental Admiralty Rules was issued and served on the product, both on the ship and in the shore tanks. An agreement was subsequently reached and recited in court which modified the sales contract and released the cargo, which had the incidental effect of releasing the M/V JACINTH.

Both the district court and court of appeals held that jurisdiction was properly invoked, characterizing the dispute as one involving a maritime contract. Both the district court and the court of appeals also came close to conceding that, when the case was first filed, the district court did not have jurisdiction because the sales agreement was not a maritime contract. The courts, however, did find that the amendment to the sales agreement, as set forth in the agreed order, became a maritime contract thus vesting jurisdiction in the court and curing the jurisdictional defect. The courts reasoned that the purpose of the agreed order was to release the M/V JACINTH back into commerce, thus transforming the agreement into a maritime contract. Interestingly, once the M/V JACINTH was released, it had no further involvement in the case. Judgment was ultimately entered based on defendants' failure to take delivery of and pay for the distillate covered by the sales agreement.

Petitioners would submit that this Court should grant the petition for writ of certiorari because the federal

court of appeals has decided an important question of federal law, which has not been, but should be settled by this Court and which has conflicted with longstanding precedents of this Court and others. In essence, the court of appeals has found that jurisdiction of the district court may be created by agreement of the parties where none previously existed. It has always been hornbook law that subject matter jurisdiction cannot be created by agreement or even waiver. *See, Jackson v. Seaboard Coast Line Railroad Co.*, 678 F.2d 992, 1000 (11th Cir. 1982) (citing *People's Bank v. Calhoun*, 102 U.S. 256 (1880)). The United States Supreme Court has not yet defined what makes a contract "maritime in nature." *Chi Shun Hua Steel Co., Ltd. v. Crest Tankers, Inc.*, 708 F.Supp. 18, 22 (D. N.H. 1989). Petitioners would call upon this Court to make such a definition and hold in this instance that a maritime contract was not created under these circumstances.

Admiralty jurisdiction extends only to wholly maritime contracts. *The Eclipse*, 135 U.S. 599, 608, 34 L.Ed. 269, 272 (1890); *Natasha, Inc. v. Evita Marine Charters, Inc.*, 763 F.2d 468, 470 (1st Cir. 1985). A maritime contract is one which "concerns transportation by sea, relates to navigable waters, and concerns maritime employment." *Richard Bertram & Co. v. Yacht Wanda*, 447 F.2d 966, 967 (5th Cir. 1971). The mere fact that a ship is involved will not bring the cause within the jurisdiction of the admiralty court. *Id.* at 967. *See also, Chi Shun Hua Steel Co., Ltd.*, 708 F.Supp. 18, 21-22 (D. N.H. 1989). Rather, whether a particular contract can be characterized as maritime depends on the nature and character of the contract. *Kossick v. United Fruit Co.*, 365 U.S. 731, 735 (1961); *Theriot v. Bay Drilling Corp.*, 783 F.2d 527, 528 (5th Cir. 1986); *Hinkins Steamship*

Agency v. Freighters, Inc., 498 F.2d 411, 413 (9th Cir. 1974).

In the present case, the contract at the center of the parties' dispute was one for the sale of luwa distillate. Although petitioner had the *option* of taking delivery on a ship, this fact has never been held sufficient to confer admiralty jurisdiction pursuant to 28 U.S.C. § 1333. A contract is not considered to be maritime simply because the services to be performed under the contract have reference to a ship or its business, or because the ship is the object of such services. *Thurmond v. Delta Well Surveyors,* 836 F.2d 952, 956 (5th Cir. 1988); *Laredo Offshore Constructors, Inc. v. Hunt Oil Co.,* 754 F.2d 1223, 1231 (5th Cir. 1985). In order to be considered maritime, there must be a direct and substantial link between the contract and the operation of the ship or its navigation. *Theriōt v. Bay Drilling Corp.,* 783 F.2d 527, 538 (5th Cir. 1986); *Weinstein v. Eastern Air Lines,* 316 F.2d 758, 766 (3d Cir.), *cert. denied,* 375 U.S. 940 (1963). "Performance of an actual 'maritime service' is required for jurisdictional 'maritime flavor' ". *Pierside Terminal Operators, Inc. v. M/V Floridian,* 423 F.Supp. 962, 967-68 (E.D. Va. 1976).

The Fifth Circuit's decision finding admiralty jurisdiction is contrary to several decisions of the federal courts, which have held that a contract for the sale of goods is not a maritime contract, even though a portion of its performance (ocean delivery) is to occur on navigable waters. *See, e.g., Tropwood A.G. v. Tae Chang Wood Industry Co., Ltd.,* 454 F.Supp. 964, 965 (N.D. Ill. 1978). Nor do questions concerning title to or possession of cargo not based on a maritime contract bear such a relationship to maritime commerce so as to be within the scope of admiralty jurisdiction. *Hunt v. A*

Cargo of Petroleum Products Laden on the S/T Hilda, 378 F.Supp. 701, 704 (E.D. Pa. 1974), *aff'd,* 515 F.2d 506 (3d Cir.), *cert. denied,* 423 U.S. 869 (1975); *Richard Bertram & Co. v. Yacht Wanda,* 447 F.2d 966, 967-68 (5th Cir. 1971). An agreement to satisfy an obligation arising from a maritime contract is not a maritime contract, and an action for breach of such a contract is not an admiralty action. *Consolidated Bathurst v. Rederiaktiebolaget Gustaf Erikson,* 645 F.Supp. 884, 886 (S.D. Fla. 1986).

The Fifth Circuit stops short of explicitly conceding the lack of jurisdiction *ab initio,* but does indicate that Petitioners' position may well be correct. The appellate court, however, indicated that the jurisdictional defect was cured by the agreed order. The Court reasoned that Judge Sterling had made a fact finding that the purpose of the settlement agreement was to release the vessel, which gave the contract the necessary maritime flavor. Although the agreement had the incidental effect of releasing the vessel, the real purpose of the compromise was to amend the sales agreement.

A contract is to be construed by ascertaining the intent of the parties from the instrument as a whole, not as separate provisions. *Vreeland v. Federal Power Commission,* 523 F.2d 1343, 1351 (5th Cir. 1976). The interpretation of the contract is a matter of law for the court. *Backar v. Western States Producing Co.,* 547 F.2d 876, 880 (5th Cir. 1977). The judicial task is restricted to interpretation of the contract as the parties made it themselves. The court must examine the entire writing in an effort to give effect to all provisions of the contract so none will be rendered meaningless. *Chapman v. Orange Rice Mining Co.,* 747 F.2d 981, 983 (5th Cir. 1984). The determination by Judge Sterling that the purpose of

the contract was to release the vessel is not a finding of fact which restricts appellate review to the clearly erroneous standard of Federal Rule of Civil Procedure 52(a).

The Fifth Circuit intimates that Defendants did not raise the propriety of a Rule D writ of attachment, which failure distinguishes cases cited by Defendants. The district court was never called upon to rule on the propriety of the Rule D attachment because the parties were working toward a compromise. The parties ultimately reached an agreement, which was, clearly, an amendment of the sales contract. The court below is in effect saying that a party confronted with an improper Rule D attachment may not reach a compromise to secure the release of property because that person runs the risk that, if a compromise is reached which allows a property to be released and has the additional effect of allowing the vessel upon which the property is placed to also be released, such compromise cures any jurisdictional defect. Such compromise furthermore allows the creation of jurisdiction where none existed before. Indeed a party, such as Transoil, must fully litigate the jurisdictional issue or run the risk that that issue is, in effect, waived. A party cannot even ask for a bond to secure the release of its property, because the bond to secure the release of cargo on a vessel also creates maritime jurisdiction, at least according to the reasoning of Judge Sterling and the Court of Appeals.

The very basis of the constitutional grant of admiralty jurisdiction was to ensure a national uniformity of approach to maritime issues. *Benedict On Admiralty* § 182 (1988). The case *sub judice* reveals the lack of such uniformity, and the need for a bright line approach to the definition of maritime contract. This case presents

this Court with the opportunity to provide guidance so that courts, as well as litigants, are assured of that uniformity sought to be created and preserved by the constitutional grant of admiralty jurisdiction.

II. When a presiding judge in a non-jury trial makes various oral pronouncements in court, states that he needs to and will file findings of fact and conclusions of law, and then passes away prior to making those findings of fact and conclusions of law, it is error for a successor judge to enter judgment.

A. Judge Sterling's oral pronouncements are insufficient to constitute findings of fact and conclusions of law.

The trial of this case took place before Judge Sterling on April 8, 1987 and April 10, 1987. There were also subsequent conferences and argument on May 18, 1987 and June 18, 1987 before Judge Sterling. At the hearing on June 18, 1987, Judge Sterling made observations in open court regarding resolution of the case. He stated that he felt that he had admiralty jurisdiction over a maritime contract (the Agreed Order); that Petitioners had breached that contract; and that he would enter judgment for Plaintiffs. He also related that he was going to have to prepare detailed findings of fact and conclusions of law. Judge Sterling died eight months later, in January 1988; the findings of fact and conclusions of law were never reduced to writing and filed.

Despite Judge Sterling's statement that he would need to file detailed findings of fact and conclusions of law, the successor judge, Judge Singleton, entered judgment for respondents based on Judge Sterling's comments at the hearing. The Fifth Circuit affirmed, holding that Judge Sterling's sketchy oral pronouncements were suf-

ficient to constitute findings of fact and conclusions of law as required by Rule 52 of the Federal Rules of Civil Procedure.

Rule 52 provides that "[i]n all actions tried upon the facts without a jury . . . the court shall find the facts specifically and state separately its conclusions of law thereon." The purpose of the rule is (1) to engender care on the part of the trial judge in making factual determinations; (2) to make clear what was decided for purposes of res judicata and collateral estoppel; and (3) to make appellate review possible. *Lopez v. Current Director of Texas Economic Development Commission,* 807 F.2d 430, 433 (5th Cir. 1987). At best, Judge Sterling's oral prounouncements are merely conclusions of law or of ultimate fact, and fail to discern the underlying findings of fact to support those conclusions. "The purpose of Rule 52(a) is satisfied if the trial court's findings are sufficient to afford a clear understanding of the ground upon which the court based its judgment." *Fluor Corp. v. United States ex rel. Mosher Steel Corp.,* 405 F.2d 823, 828 (9th Cir.), *cert. denied,* 394 U.S. 1014 (1969).

In reviewing Judge Sterling's pronouncements, the Fifth Circuit found no necessity for over-elaboration of detail or particularization of facts. The court found that the critical aspects of the case involved characterization of the agreement as a maritime contract and a determination that Transoil breached it. The Fifth Circuit also stated that Judge Sterling stated his reasoning with sufficient force and particularly for this court to understand them, to review them and find that they were not clearly erroneous. Ironically, in discussing the damages, the Fifth Circuit stated that it was unclear about certain aspects of the case, and acknowledged that there was nothing

in the record to indicate that the district court ever determined precisely what had happened to the luwa distillate.

Judge Sterling's oral pronouncements did not contain any explanation of subsidiary facts. There were defenses raised by the defendants at trial which were not addressed by the court. The damages were not articulated. Defendants submit that other courts of appeal would require findings on subsidiary facts as well as the ultimate fact findings pronounced by Judge Sterling. As such, the opinion of the Fifth Circuit conflicts with other circuits and this Court should grant certiorari on that basis alone. The Sixth and Seventh Circuits have held that Rule 52(a) requires sufficiently explicit findings of subsidiary facts so as to provide an appellate court with a clear understanding of the basis for the district court's decision. *Grover Hill Grain Co. v. Baughman-Oster, Inc.*, 728 F.2d 784, 792 (6th Cir. 1984); *Denofre v. Transportation Ins. Rating Bureau*, 532 F.2d 43, 45 (7th Cir. 1976). Likewise, the Tenth and Eleventh Circuits have required the court to make specific findings on all material issues raised in the case. *Self v. Great Lakes Dredge & Dock Co.*, 832 F.2d 1540, 1549 (11th Cir. 1987), *cert. denied*, 108 S. Ct. 2017 (1988); *Otero v. Mesa County Valley School District No. 51*, 568 F.2d 1312, 1316 (10th Cir. 1977). The Fifth Circuit has not articulated such a requirement, as is evidenced in this case.

B. The District Court erred in entering judgment because there were inadequate findings of fact and conclusions of law to meet the requirements of Rule 63 of the Federal Rules of Civil Procedure.

Rule 63 of the Federal Rules of Civil Procedure allows a successor judge, such as Judge Singleton, to enter judg-

ment only if his predecessor became disabled "after a verdict is returned or findings of fact and conclusions of law are filed."

In affirming Judge Singleton's entry of judgment, the Fifth Circuit took the position that Judge Sterling's pronouncements were findings of fact and conclusions of law. However, Judge Sterling clearly did *not* intend his pronouncements in court to serve as findings of fact and conclusions of law, nor did he view his statements sufficiently specific to serve that purpose for Judge Sterling noted that "I will have to file detailed findings and conclusions . . ." (June 18, 1987 hearing)

The negative inference of Rule 63 is that the substitution of a judge is implicitly prohibited before findings of fact and conclusions of law are returned. *See, Whalen v. Ford Motor Credit Co.*, 684 F.2d 272, 274 (4th Cir.) (en banc), *cert. denied*, 459 U.S. 910 (1982). The *Whalen* court held that, if a trial judge died or was disqualified from deciding a civil jury case before a verdict is returned, then a substitute judge could not continue the case unless the parties consented. *Id.* at 274. This reasoning was extended to include cases before a master in *Henry A. Knott Co. v. Chesapeake & Potomac Tel. Co.*, 772 F.2d 78 (4th Cir. 1985), holding that, when a master dies or is disqualified before rendering factual findings, a new trial must be granted if the case involves disputed questions of fact or is dependent upon credibility determinations. *Id.* at 87. Thus, where as here, portions of the trial are held before a district judge who later dies before making findings and conclusions, then a successor judge cannot continue the case unless the parties consent. *Id.* at 82. As stated in *Townsend v. Gray Line Bus Co.*, 767 F.2d 11, 18 (1st Cir. 1985) the implications of Rule 63 and constitutional

considerations (due process) require a new trial where the trial judge dies before filing findings and conclusions. *See also, Thompson v. Sawyer,* 678 F.2d 257, 268-69 (D.C. Cir. 1982); *Arrow Hart, Inc. v. Phillip Carey Co.,* 552 F.2d 711, 713 (6th Cir. 1977); *Brennan v. Grisso,* 198 F.2d 532, 533 (D.C. Cir. 1952).

The idea that the person who hears the evidence should be the one who decides the case is part of the American conception of a fair trial. *Henry A. Knott & Co.,* 772 F.2d at 85. "The problem of the successor judge . . . is that one person hears the testimony and another person makes the factual findings without having seen or heard the witnesses. This separation of a trial judge's functions without the consent of the parties, seems to us to infringe upon the integrity of the fact finder's role. Deference to such findings by a district court or an appellate court, would be misplaced on such a case." *Id.* at 85.

The district judge in this case, Judge Singleton, did not rehear any of the witness' testimony. In fact, he decided the case based solely upon a record, which is typically the function of an appellate court, not a trial court. The person who decided the case was not the person who heard the case presented. Having the same judge preside throughout the case is especially important in a non-jury trial such as here, because it is the judge who will determine which witnesses are more credible based upon their live testimony and demeanor.

While Rule 63 does not explicitly cover instances where the trial judge becomes disabled prior to filing findings and conclusions, many of the lower federal courts have read into Rule 63 the negative inference that, if the presiding judge has yet to issue his findings of fact and conclusions of law, a successor judge *must*

retry the case. Contrary to the Fifth Circuit's decision, there is no room for the successor judge to exercise discretion in this area. Neither the Rule nor the decisions of other federal courts support the result reached by the Fifth Circuit. A successor judge *must* retry the case unless the parties consent otherwise or summary judgment would be appropriate, *Emerson Elec. Co. v. General Elec. Co.*, 846 F.2d 1324, 1326 (11th Cir. 1988).

Furthermore, the history of Rule 63 before the Advisory Committee on the Federal Rules of Civil Procedure, described by the First Circuit in *Home Placement Service v. Providence Journal Co.*, 819 F.2d 1199 (1st Cir. 1987) clearly illustrates the error of the Fifth Circuit in affirming the district court's judgment under the circumstances. The committee acknowledged that, unless the parties stipulated otherwise, Rule 63 required a case yet to be decided and interrupted by the disability of the trial judge to begin anew before a successor judge. *Id.* at 1202. It has also been held that constitutional considerations of fairness embodied in the due process clause of the Fifth Amendment will ordinarily require a new trial. *Townsend v. Gray Bus Line Co.*, 767 F.2d 11, 18 (1st Cir. 1985). The due process considerations are especially evident in the present case. Not only does the lack of conclusions of law impair petitioner's ability to adequately appeal, but the numerous defensive issues raised by petitioners in the district court were never ruled on nor otherwise addressed by either the district court or the Fifth Circuit.

This court has never ruled on the degree of specificity required of findings and conclusions, nor has it addressed the propriety of a successor judge continuing a case when his predecessor dies prior to making findings and con-

clusions. The action of the Fifth Circuit contradicts the rulings of the federal courts that have addressed these issues, and has the effect of severely undercutting Petitioner's due process rights to a fair trial. For these reasons, Petitioner requests that this Court grant certiorari to review the proceedings below.

Respectfully submitted,

By: _____

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing instrument has been served on all counsel of record, via certified mail, return receipt requested, on this the 20 day of September, 1989.

_____

THOMAS B. GREENE, III

APPENDIX

APPENDIX A

REX OIL, LTD., and Empire
Petroleum International, Inc.,
Plaintiffs-Appellees, Cross-Appellants,

v.

M/V JACINTH, etc., et al.,
Defendants,

Transoil (Jersy) Ltd. and Transoil U.S.A., Inc.,
Defendants-Appellants, Cross-Appellees.

No. 88-2455.

United States Court of Appeals,
Fifth Circuit.

May 19, 1989.

Seller of fluid chemical brought action against buyer for breach of settlement agreement, which provided for release of ocean-going vessel and sale/transportation of 80,000 barrels of fluid chemical. The United States District Court for the Southern District of Texas, John V. Singleton, Jr., J., entered judgment in favor of seller. Buyer appealed. The Court of Appeals, Garza, Circuit Judge, held that: (1) settlement agreement was "maritime contract" giving the District Court admiralty jurisdiction over dispute; (2) successor judge properly entered final judgment after predecessor judge's death; and (3) damages award was incorrectly calculated.

Affirmed in part and vacated and remanded in part.

Thomas B. Greene, III, Houston, Tex., for defendants-appellants, cross-appellees.

L. Burke Lewis, Amy J. Cassedy, Los Angeles, Cal., for plaintiffs-appellees, cross-appellants.

Appeals from the United States District Court for the Southern District of Texas.

Before GARZA, JOLLY, and JONES, Circuit Judges:

GARZA, Circuit Judge:

This case was originally tried before Judge Sterling of the United States District Court for the Southern District of Texas on April 8 and 10, 1987. Ten months later, before entrance of final judgment, Judge Sterling passed away. On February 4, 1988, pursuant to Fed. R. Civ. P. 63, Judge Singleton entered judgment against appellant Transoil in the amount of $702,400, plus pre-judgment and post-judgment interest.

The parties raise four issues on appeal: (1) Whether the district court had subject matter jurisdiction of this dispute; (2) Whether Judge Singleton properly entered final judgment following the death of Judge Sterling; (3) Whether Judge Sterling entered findings of fact and conclusions of law sufficient for Judge Singleton to enter judgment in favor of appellees; and (4) Whether the trial court properly calculated damages.

We conclude that the district court had subject matter jurisdiction of this case and that Judge Singleton properly entered final judgment. We are convinced, however, that the court incorrectly calculated appellee's damages and we remand for proper determination of that issue.

Background

This dispute involves a "back-to-back" contract wherein Atlantic Richfield Company ("ARCO") agreed to sell a certain petroleum product to Empire Petroleum ("Rex/Empire") (appellees Rex Oil and Empire Petroleum entered into a joint venture specifically for the performance of this transaction) which, in turn, would sell the product to Transoil, Ltd. ("Transoil"). The product was a fluid chemical called "luwa," a distillate blend used to enhance the quality of certain oil products.

Eighty thousand barrels of the luwa was delivered by ARCO to Paktank storage tanks located in Houston. Transoil was obligated to nominate an ocean-going vessel to lift all 80,000 barrels at Houston. Ownership of the product was to pass from Rex/Empire to Transoil at the storage tank flange. Transoil secured payment by causing the Banque de Paris et des Pays-Bas ("Banque Paribas") to issue a letter of credit in favor of Rex/Empire upon the endorsement of supporting warehouse receipts.

On December 2, 1985, Transoil nominated the M/V JALINGA to load the product at the Paktank terminal. Rex/Empire, however, was having difficulty making arrangements with its supplier, ARCO, and the product was never released to Rex/Empire. Consequently, the M/V JALINGA sat idle in the Houston area for six days and was finally dispatched without the 80,000 barrels of luwa. This first encounter with Rex/Empire made Transoil skeptical of the seller's ability to deliver. Nevertheless, the price of the product was right and, after further negotiations, the parties agreed to give it another try.

On January 6, 1986, Transoil nominated another ship, the M/V JACINTH, to transport the product. This vessel, however, was incapable of lifting more than 59,000 barrels. It was thus unable to transport the entire product in a single "lift," as required by the terms of the contract between Rex/Empire and Transoil. Nevertheless, 59,000 barrels of luwa were erroneously loaded onto the M/V JACINTH. When Rex/Empire requested that the cargo be unloaded, Transoil refused.

On January 9, 1986, Rex/Empire obtained a Rule D, Supplemental Maritime Rules Writ of Attachment of the M/V JACINTH, thereby effecting an arrest and seizure of the 59,000 barrels of luwa. The next day, January 10, 1986, the parties held an emergency hearing before Judge Sterling. There Rex/Empire and Transoil reached an agreement providing for the release of the M/V JACINTH and the sale/transportation of another 80,000 barrels of luwa. The product on board the M/V JACINTH was to be sold to a third party, Chesham Petroleum Company. The agreement further provided that: "If Transoil does not nominate a vessel to lift the cargo by January 31, 1986, plaintiffffs may present negotiable warehouse receipts and obtain full payment for the said 80,000 bbls. under the above described letter of credit." Judge Sterling signed the agreement and the parties continued on their way.

On Friday, January 24, 1986, at approximately 7:00 pm E.S.T., Transoil nominated the M/V SLETHAV to lift the luwa cargo in Houston. The ship presented "notice of readiness" to be loaded on Saturday, January 25, 1986. Rex/Empire claimed at trial that it had received no notice of the arrival of the M/V SLETHAV

until Monday, January 27, 1986, at approximately 9:45 am, C.S.T. Appellee also asserts that the nomination violated Transoil's own nominating procedures as well as the procedures set out in the agreement of January 10, 1986.

Transoil argued before Judge Sterling that the nomination of the M/V SLETHAV was properly effected and that Rex/Empire accepted the nomination but failed to deliver the cargo. Due to the previous default by Rex/Empire and because of the expenses incurred in holding the M/V SLETHAV over the week-end, Transoil released the ship, without the luwa, at noon on Monday, January 27, 1986. When Transoil failed to nominate another vessel by January 31, 1986, Rex/Empire presented negotiable warehouse receipts endorsed to Banque Paribas for full payment for the 80,000 barrels of luwa. At the direction of Transoil, Paribas refused to pay Rex/Empire upon the presentment of the instruments.[1] Transoil, of course, argues that it nominated a vessel capable of lifting the cargo before January 31, 1986, as prescribed by the terms of the agreement of January 10th.

Rex/Empire subsequently sued Transoil in the United States District Court for the Southern District of Texas asserting maritime jurisdiction.[2] Judge Sterling presided at trial on April 8 and 10, 1986. He held a final hearing on June 18, 1986 to elicit further arguments from counsel and to issue oral findings and conclusions.

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1. At the time this case was brought, Rex/Empire also had a suit pending in a Swiss court against Banque Paribas involving the right to payment under the letter of credit. The warehouse receipts representing title to the luwa are under sequestration in Switzerland.

2. Complete diversity among the parties is not extant.

At the hearing, Judge Sterling determined that the court had subject matter jurisdiction of the lawsuit. He explained that, regardless of what had taken place prior to January 10, 1986, on that date the parties reached an agreement "the object of which was to return the JACINTH to commerce. It is my conviction that that agreement was a maritime contract." Pursuant to that maritime contract, Rex/Empire was permitted to draw against a letter of credit on the basis of warehouse receipts in the event that Transoil failed to lift the cargo by January 31, 1986.

Judge Sterling gave a fairly extensive oral exposition of his perceptions about the case. He concluded that Transoil had breached the agreement of January 10, 1986. He stated his intention to enter final judgment in favor of Rex/Empire. During the hearing, he related his basic reasoning for entering such a judgment. He also indicated that he planned "to file detailed findings and conclusions." Approximately eight months later, before filing such findings and conclusions, Judge Sterling passed away.

Discussion

Subject Matter Jurisdiction.

Transoil argues that the district court lacked subject matter jurisdiction to hear this case. It urges that this dispute is about nothing more than a land-based agreement for the sale and purchase of a petroleum product. That the transportation of the product was to be effected by ocean-going vessel did not bring the case within the court's admiralty jurisdiction. And since the original contract was not maritime in nature, according to Transoil,

it was improper for the court to issue a Rule D Writ of Attachment. Notwithstanding that the January 10, 1986 agreement involved the dissolution of the writ, Transoil argues that the agreement should not permit the appellees to "bootstrap" the creation of admiralty jurisdiction when it never existed in the first place.

Transoil cites *Hunt v. A Cargo of Petroleum Prod. Laden on the Steam Tanker Hilda,* 378 F.Supp. 701 (E.D. Pa. 1974), *aff'd,* 515 F.2d 506 (3d Cir. 1975), *cert. denied,* 423 U.S. 869, 96 S. Ct. 132, 46 L.Ed.2d 98 (1975), wherein the District Court for the Eastern District of Pennsylvania held that admiralty jurisdiction does not encompass a suit to try title to, or the right to possession of, cargo on an ocean-going vessel when the claim to the cargo is not based upon the breach of a maritime contract or the commission of a maritime tort. In that case, plaintiff Nelson Bunker Hunt obtained a writ of attachment and sought possession of a cargo of petroleum laden on a steamship moored in the Port of Philadelphia. Plaintiff Hunt claimed that the oil had its source in an oil field belonging to the Hunt brothers which had been unlawfully seized when the Libyan government nationalized its oil industry. The court concluded that "questions concerning title to or possession of cargo not based on a maritime contract or tort do not bear a significant relationship to maritime commerce."

The *Hunt* case is inapposite. There was no agreement in that case, as there was here, to release the S.T. Hilda into commerce. Rather, the merits of the propriety of the Rule D seizure was tried to, and determined by the court. The case at bar has sailed into our court, as it were, in a very different posture.

It may well be that the district court here improperly issued the Rule D Writ of Attachment back on January 9, 1986. That question, however, is not before us because instead of litigating that issue, as the defendants did in the *Hunt* case, Transoil entered into a settlement agreement on January 10, 1986, the effect of which was to release a sea-going vessel into commerce. Thus the question before us here is not whether the writ was properly issued but whether the settlement agreement was a maritime contract that cured any jurisdictional defect that might have rendered that issuance improper.

The parties to the agreement obviously operated under the assumption that the M/V JACINTH could not leave Houston until the Writ of Attachment had been dissolved. Hence, Judge Sterling, who directly witnessed the negotiations between the parties, plainly found as a fact—making allowances for the fact that the record in this case is informal, as discussed below—that the purpose of the agreement was to "release the vessel by these mutual promises." He was in the best position to know the purpose of the agreement, and we cannot say that his finding was clearly erroneous. On the basis of that finding, Judge Sterling concluded as a matter of law that the agreement of January 10 was a maritime contract. In Judge Sterling's words: "I'm saying the deal cut here on the night of January 10th is a maritime contract because it was for a release of the vessel. It's just the same as a bond, but there was an agreement and a stipulation for release and that is maritime."

[1-3] Admiralty jurisdiction exists over any dispute involving maritime contract. *Best v. Honeywell, Inc.*, 491 F.Supp. 269, 271 (D. Conn. 1980), *aff'd mem.*,

679 F.2d 872, 874 (2d Cir. 1981). To invoke admiralty jurisdiction, the contract must be wholly maritime in nature and relate to trade and commerce upon navigable waters. *R. Maloblocki & Associates, Inc. v. Metropolitan Sanitary Dist. of Greater Chicago,* 369 F.2d 483, 484 (7th Cir. 1966). A contract that consists of maritime and nonmaritime elements will be considered "wholly" maritime, so that the district court can exercise admiralty jurisdiction over disputes involving contract, where nonmaritime elements of the contract are incidental to the maritime elements, or where nonmaritime elements are inseparable from maritime elements. *Puerto Rico Maritime Shipping Authority v. Luallipam, Inc.,* 631 F.Supp. 1472, 1474 (D. Puerto Rico 1986). Because Judge Sterling found that the purpose of the agreement was the return of the JACINTH to commerce, we conclude that nonmaritime elements of the agreement were incidental. Furthermore, because the release of the ship was part of the consideration Rex/Empire gave Transoil, the provisions for the subsequent purchase and sale of luwa were so intertwined with and dependent upon the release of the vessel as to be inseparable from it. Thus, we hold that Judge Sterling was correct to conclude that the whole contract was maritime in nature and that therefore the district court had maritime jurisdiction over ensuing disputes.

[4] In conclusion, regardless of whether the Writ of Attachment was properly issued, the district court obtained jurisdiction of this case as a result of the January 10th maritime contract and retained it thereafter to determine whether Transoil had breached that contract. Given the fact that the district court had jurisdiction of the contract dispute, we must agree with Judge Sterling's

decision on the merits. There was testimony at trial by the Managing Director of Empire Petroleum and others to the effect that the nomination of the M/V JACINTH improperly amended the letter of credit and violated the agreement of January 10th. Judge Sterling found that evidence credible. We conclude that the evidence adduced at trial supports the finding that Transoil breached its agreement with Rex/Empire.

The Propriety of Judge Singleton's Final Judgment.

[5] Transoil urges that Fed. R. C. P. 63[3] mandates a new trial because Judge Sterling did not file findings of fact and conclusion of law prior to Judge Singleton's decision to enter final judgment. Appellant argues that the "negative inference" of Rule 63 precludes a successor judge from entering final judgment when the predecessor judge has failed by reason of death, sickness or other disability, to file findings of fact and conclusions of law. Since Judge Sterling never filed such findings, according to Transoil, it was improper for Judge Singleton to enter final judgment.

Rule 63 leaves entirely to the discretion of the successor judge the decision to perform the duties left unfinished by the predecessor or, in the alternative, to order

3. Fed. R. C. P. 63 provides:

If by reason of death, sickness or other disability, a judge before whom an action has been tried is unable to perform the duties to be performed by the court under these rules after a verdict is returned or findings of fact and conclusions of law are filed, then any judge regularly sitting in or assigned to the court in which the action was tried may perform those duties; but if such other judge is satisfied that because such other judge cannot perform those duties because such other judge did not preside at the trial or for any other reason, such other judge may in such other judge's discretion grant a new trial.

a new trial. We agree with appellant, however, that this grant of authority arises, by the terms of Rule 63, only "after a final verdict is returned or findings of fact and conclusions of law are filed." The propriety of Judge Singleton's entrance of final judgment, thus, turns upon whether Judge Sterling's pronouncements at the hearing on June 18, 1986 constituted findings of fact and conclusions of law.

The Sufficiency of Judge Sterling's Oral Pronouncements as Findings of Fact and Conclusions of Law.

Transoil characterizes the court's declarations on June 18, 1987, as a "sketchy pronouncement of Judge Sterling's feelings about the case." Rex/Empire calls them "extensive findings of fact and conclusions of law." They cannot be both. A fair assessment of them would reflect something between these two extremes.

Fed. R. Civ. P. 52(a)[4] provides guidance to our decision in this case in two ways. First, the rule states that

4. Fed. R. C. P. 52(a) states:

(a) In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

"[f]indings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." Second, the rule provides that "[i]t will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence." We know nothing more, from the terms of Rule 52(a) itself, about whether the court's findings must be "extensive," or whether a "sketchy pronouncement" will suffice.

In *United States v. Forness*, 125 F.2d 928 (2d Cir. 1942), *cert. denied*, 316 U.S. 694, 62 S. Ct. 1293, 86 L.Ed. 1764 (1942), the Second Circuit concluded that the trial court need only make brief, definite, pertinent findings and conclusions on the contested matters. That court found no necessity for over-elaboration of detail or particularization of facts. We likewise find no such necessity.

The crucial aspects of this case involved the characterization of the agreement of January 10th as a maritime contract and the determination that Transoil breached it. Upon these points, Judge Sterling stated his reasoning with sufficient force and particularity for this court to understand them, to review them and to find that they were not clearly erroneous. Rule 52(a) does not require more. *See Curtis v. Commissioner of Internal Revenue Service*, 623 F.2d 1047, 1051 (5th Cir. 1980) (findings must be sufficiently detailed to give appellate court clear understanding of analytical process by which ultimate findings were reached and to assure that care was taken in ascertaining facts).

Appellants place dispositive force in Judge Sterling's stated intentions to file more detailed findings of fact and conclusions of law. From the recognition that the trial court wished to write a "detailed" opinion, it does not follow that the findings and conclusions stated orally and recorded in open court were insufficient for the purposes of Rule 52(a). For all we know now, Judge Sterling may have intended to file a lengthy admiralty tome to dispose of this case; but, clearly, the absence of such a tome does not operate to necessitate a new trial. Recognition of what Judge Sterling intended to do does not vitiate what he actually did. His oral findings of fact and conclusions of law were adequate to satisfy Rule 52(a).

Damages.

[6] We are convinced that the district court incorrectly calculated plaintiff's damages. The contract between Rex/Empire and Transoil called for the sale of 80,000 barrels of luwa at a price of $15.50 per barrel, or a total contract price of $1,240,000. The cost to Rex/Empire was the purchase price it was to pay to ARCO for the luwa: $6.72 per barrel, or a total of $537,600. The trial court awarded Rex/Empire its lost profit: $702,400, representing the total contract price minus the purchase price Rex/Empire was to pay to ARCO.

There was argument before Judge Sterling on June 18, 1986 to the effect that title to the luwa was tied up in the Swiss courts pending a resolution of this case and a disposition of the funds sequestered by the court in Switzerland. It appears that Rex/Empire does not presently have a claim of ownership to the product because title is represented by negotiable warehouse receipts that

have been endorsed to Banque Paribas. It further appears that Rex/Empire continues to be obligated to pay ARCO the purchase price of $537,600 for the luwa.

This Court is unclear about the relationship between the proceedings in Switzerland and the resolution of the case before us. There is nothing in the record to indicate that the district court ever determined precisely what has happened to the luwa. It is clear, however, that the determination of who holds title to the product will affect the measure of plaintiff's damages. It appears from the present posture of the case that an award of $702,400 does not place Rex/Empire in the position the company occupied before Transoil's breach; rather, it seems to leave appellee $537,600 short.

We therefore remand to the district court for proper determination of damages. Such resolution should include an inquiry into the impact, if any, of the proceedings in the Swiss court upon the title to the luwa; the result of that inquiry may, in turn, affect the amount of appellee's damages. In addition, a dispute exists over charges owing to Paktank for storage of the luwa. The court should resolve this dispute and consider these storage charges in its calculation of damages.

Conclusion

For the reasons stated above, we AFFIRM the decision of the district court as it relates to jurisdiction and liability. We VACATE the court's damage award and REMAND for further consideration of that issue, consistent with this opinion.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 88-2455

REX OIL, LTD., and EMPIRE
PETROLEUM INTERNATIONAL, INC.,
Plaintiffs-Appellees, Cross-Appellants,

v.

M/V JACINTH, ETC., ET AL.,
Defendants,

TRANSOIL (Jersey) LTD., and
TRANSOIL U.S.A., INC.,
Defendants-Appellants, Cross-Appellees.

Appeal from the United States District Court for the
Southern District of Texas

ON PETITION FOR REHEARING

(June 22, 1989)

Before GARZA, JOLLY and JONES, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

/s/ E. GRADY JOLLY
United States Circuit Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-86-103

REX OIL, LTD., AND EMPIRE
PETROLEUM INTERNATIONAL, INC.,
Plaintiffs

v.

TRANSOIL (JERSEY) LTD.,
TRANSOIL USA, INC., ET AL,
Defendants

(Filed April 15, 1988)

ORDER

The matter presently before this Court is Defendants' Motion for New Trial. The Court, having considered the motion, finds it to be without merit. It is therefore

ORDERED that the relief sought by Defendants is hereby DENIED.

SIGNED this 15th day of April, 1988, at Houston, Texas.

/s/ JOHN V. SINGLETON, JR.
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-86-103

REX OIL, LTD., AND EMPIRE
PETROLEUM INTERNATIONAL, INC.

v.

TRANSOIL (JERSEY) LTD.,
TRANSOIL U.S.A. INC.

(Filed February 4, 1988)

FINAL JUDGMENT

This matter is before this Court because of the untimely death of Judge Ross N. Sterling. This Court enters this Final Judgment pursuant to Rule 63, Fed. R. Civ. P., based on the Findings of Fact and Conclusions of Law stated orally in open Court by Judge Sterling during a June 19, 1987 hearing. *See* Rule 52, Fed. R. Civ. P.

Pursuant to Judge Sterling's Findings of Fact and Conclusions of Law this Court hereby ORDERS, ADJUDGES and DECREES that: the plaintiffs, Rex Oil, Ltd. and Empire Petroleum International, Inc., shall recover against the defendants, Transoil Ltd., and Transoil U.S.A., Inc., jointly and severally, actual damages in the amount of $702,400.00; and

Further, that Plaintiff's request for attorney's fees is hereby DENIED; and

Further, that Plaintiff shall take nothing on its claims of Fraud and Conversion, as well as its claim for Exemplary Damages; and

Further, that Plaintiff shall recover pre-judgment interest at the rate of 10% *per annum* from January 10, 1986 until the date of this Judgment; and post-judgment interest at the rate of 7.14% *per annum* from the date of this Judgment until the date paid; and

Further, Plaintiff shall recover its costs associated with this case.

SIGNED this 4th day of February, 1988, at Houston, Texas.

/s/ JOHN V. SINGLETON, JR.
United States District Judge

APPENDIX E

[1]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H 86-103

REX OIL LTD., and EMPIRE
PETROLEUM INTERNATIONAL, INC.,
Plaintiffs,

v.

M/V JACINTH, ARCO CHEMICAL CO., TRANSOIL
(JERSEY) LOUSIANA, LTD., and
TRANSOIL U.S.A., INC.,
Defendants.

Houston, Texas
June 18, 1987
4:30 P.M.

TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE ROSS N. STERLING

APPEARANCES:

FOR THE PLAINTIFF:

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[2]

COURT REPORTER:

WALTER R. LAUCKNER
Room (Illegible)
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Houston, Texas 77002

Reported by Stenomask and Dictated for Transcription

[3]

THE COURT: All right. Let's take up Civil Action Number H86-103, Rex Oil, Ltd. and Empire Petroleum International versus M/V Jacinth, etc., etc.

I think the first thing that we ought to do is discuss the threshold question of jurisdiction, admiralty jurisdiction.

Having read your post trial briefs and having gone back over the transcript and everything, I am convinced I do have admiralty jurisdiction. Let me tell you why. If some controversy had arisen out of this matter and the original nomination of the vessel and there was some difficulty it would have been purely on a non maritime matter. This was a sale of goods and incidentally involved ocean transport. The first nomination they were unable to lift the thing and number one left.

Then came Jacinth. The price of all kinds of petroleum products dropped. The letters of credit financing the commercial transaction and purchase and sale of this material had to be amended and things got jammed up and so forth.

Finally Jacinth came in and put the fifty-nine thousand barrels of lube on board. The Plaintiff had its lost control officer and somebody else there to observe and everybody was under the impression that what was being loaded aboard the Jacinth was material out of the sealed tanks that had been

[4]

tested by shore tanks 728 & 735 at Paktank terminal. It was discovered that Jacinth couldn't take the whole eighty thousand barrels contemplated under the original agreement. We got locked up again. Then we had the lawsuit filed.

This Court issued its writ for the arrest of the Jacinth as it had to do to hold the cargo, there being a dispute over the ownership of the cargo. Despite the fact if they were operating under the original agreements, the title and risk of loss passed to Transoil at the flange on Paktank's dock, but until that happened we still had land based contracts, not maritime in nature.

The lawsuit was filed and there is one question in my mind and I would like to hear from you gentlemen about this. Once a part of that material was onboard the vessel, could the Plaintiff have gone into State Court and attached that material in contemplation of a lawsuit? Could they have done that or is that a matter strictly within the maritime jurisdiction of the Federal Court?

MR. THETFORD: Your Honor, the Plaintiff could have done that, theoretically. I'm not aware of any procedure under state law pursuant to which we can attach bills of lading, which was what we were trying to get from you that evening. The cargo was on the vessel. The only remedy we sought was the action of bringing up title to the property. The other way to have dealt with it, rather than seize it, was issue an order

[5]

directing the Master to issue bills of lading to us. That is the connection to the admiralty jurisdiction. I don't know that an attachment under State Court would have been allowed. I don't know if we could show the burden to attach the cargo and certainly we could never get a constable to go out there and do that.

MR. GREEN: If I could speak to that, I disagree. I believe the Plaintiff did have available to it the extraordinary writs available in State Court of sequestration or attachment in a situation where this dispute over title to property that's within the jurisdiction of the Court. I don't think the fact part of it's on Paktank's line and part of it's on the ship would deprive the State Court of the jurisdiction to issue the writ. If the writ is issued, I think the constable would go out and serve it. If a bill of lading had been issued, then it is a negotiable instrument under Article 9 or Article 3 of the SEC, whatever it is, and I think that that could also be seized in conjunction with the State Court proceeding.

THE COURT: Well, I have serious doubts about that. I really think what they were seeking to be found was only over here.

Now, if I am wrong about that—nevertheless, we had the night session and the parties did work out an agreement. It was signed by all parties and it bore the

[6]

heading an agreed order, something like that, and I put my signature on it then or eventually, for whatever holy water effect that may have had.

Even if I didn't have jurisdiction over the matter in the first place, there was an agreement among the parties which was arrived at through considerable discussion, not only among counsel, but counsel and the principals, the object of which was to return the Jacinth to commerce.

It is my conviction that that agreement is a maritime contract. The question becomes if I didn't have jurisdiction to issue the writ because up until that point we didn't have a maritime situation, does the Court's interference or presence, the statement we'll work something out or put this back in Paktank's tanks, does that amount to any sort of cohersiveness that wouldn't make that agreement voidable or does it amount merely to a mistake of law on the part of everyone that would not make that contract necessarily voidable, and I think not. The agreement was made for adequate consideration on both sides. As I understand the agreement it was embodied in that paper that I signed and it may be that I merely signed it as a witness, if I didn't have jurisdiction, I just signed it as a witness, but I don't think we should let form rule over the substance of the matter. The object of it was to put the Jacinth back to sea. To do that, as I understand it, the Plaintiffs were willing to have the Master of the

[7]

vessel issue bills of lading to Cheshin and that was on the basis that the quality provisions in the original contract were no longer in effect, except to the extent it was to be raised by Arco as tailings, or whatever you want to call them from the refining process. The material, as I understand the evidence went on Jacinth came out of tanks and it had all been tested and sealed and made on that basis. Transoil said okay on that agreement we'll take the eighty thousand from wherever it may be, quality is out the window, and if-we don't pick it up by January 31st, you Rex, and Empire will be permitted to draw against the letter of credit on the basis of warehouse receipts and we will take delivery in place.

I conceive this to be one made on that contract that night and that was a maritime contract.

Do you want to argue against that?

MR. GREEN: I think I'm the appropriate one to argue against it, Your Honor. We certainly don't take the position that we never entered into a contract or that the contract is somehow void because of cohersion that may have been made or the predicament we are in.

If indeed the dispute resolves around the breach of the contract, then there is a legitimate dispute. It is our feeling, though, the Court has no jurisdiction, no maritime jurisdiction over the dispute originally that generated the agreement and it just can't create jurisdiction

[8]

because an agreement was made.

THE COURT: Do you want to file another lawsuit on the contract made on the night of January 10th?

MR. GREEN: First of all, it is our contention that the Court had no jurisdiction to issue, to rule on the attachment to start with because when you're dealing with cargo as opposed to a vessel—if they had seized the vessel that would be one thing. They didn't seize the vessel, they seized the cargo both in Paktank and whatever cargo that was loaded on the ship.

THE COURT: The ship can't leave with the cargo in it and leave the cargo behind. Seizing the cargo effectively seizes the vessel.

MR. GREEN: That is correct, but the dispute was against the cargo and not against the ship and as the Court is well aware there are a lot of maritime laws follow little technical rules that may not make sense if you look at the overall picture, but that's the way the law has developed.

In dealing with Rule D attachment you are not dealing with a ship or the cargo, you have to have maritime jurisdiction to start with before you can issue the Rule D attachment and that has to arise on the breach of a maritime contract, which we have stated and we briefed the point that this was not a maritime contract, to start with.

THE COURT: I agree.

[9]

MR. GREEN: Or there has to be a maritime tort and the Plaintiff has said the tort is conversion, and, again we contend—

THE COURT: There wasn't any conversion in this case.

MR. GREEN: That leaves the Court at the time it issued the Rule D attachment with no jurisdiction to issue the attachment.

THE COURT: I didn't know there was any conversion at the time I issued it. but now we do know and at this time having heard the evidence. I am of the opinion it was not a conversion, and if it was, it was forgiven by agreement of the Plaintiffs to have the bills issued to Cheshin, so what we are talking about is a breach of an agreement made on January 10th. There were no quality representations other than there would be eighty thousand barrels of luau delivered to Transoil and if Transoil didn't pick it up by January 31st, that, Rex and Empire, could draw on the letter of credit on the basis of warehouse receipts. Your people ordered your bank not to do that, not to pay.

MR. GREEN: I would disagree with that characterization of the agreement, first of all.

If I could make one more point on the jurisdiction argument, with the Court's permission. If there was no conversion and the Court's determined there's no conversion on the merits, I take it. at this point initially, it is our

[10]

feeling that even the allegations that were made at the time by the Plaintiffs about what they contended was a conversion, even if those allegations were true, that still

would not give rise to a maritime tort, accepting all of their allegations as true.

THE COURT: I am saying we don't have to worry about maritime tort. We're talking about a maritime contract for the release of a vessel to re-enter commerce.

MR. GREEN: If the Court has no jurisdiction to start with, then the Court had no jurisdiction to create the order or approve the order or later approve the agreement.

THE COURT: You weren't listening to what I was saying. I don't think it makes any difference. The parties agreed to release the vessel by these mutual promises, and if I didn't have jurisdiction we were all up here until ten o'clock at night and I was just a witness, but you worked out the deal. You have not claimed there was any cohersion or anything. Both sides wanted the thing to go and they made promises back and forth to one another as to how it could be worked out and you breached the contract.

MR. GREEN: I would submit the contract that was breached, and of course I wasn't involved in that case at that time, is just an amendment of the original sales agreement over which—the reason the ship had to be released is it was seized in the first place and if the Court had no jurisdiction

[11]

to seize it, then the fact it was released to allow it to go back into commerce shouldn't create jurisdiction by itself.

THE COURT: There is nobody up here saying I didn't have jurisdiction to seize the vessel.

MR. GREEN: That may be the case. Certainly subject matter jurisdiction is something that can be raised at any time. We raised it early on when our firm got involved and we maintained the position consistently throughout the history of the case. But, even if it wasn't raised, it is something that can be raised at any time.

THE COURT: But it goes out the window because you made a deal. You negotiated the price down. You sent a vessel six times too big then you sent one not big enough. Then after you cut the deal here at the courthouse as to how you were going to get the vessel away, you say okay we will take eighty thousand from wherever it comes as luau and if we don't pick it up by the 31st, you can use your warehouse receipts and then you told the bank don't honor them.

MR. GREEN: If the deal was a non maritime deal the first time—

THE COURT: I'm saying the deal cut here on the night of January 10th is a maritime contract because it was for the release of the vessel. It's just the same as a bond, but there was an agreement and a stipulation for release and that is maritime.

[12]

Transoil Ltd. and Transoil U.S.A. are both owned by the same individual. Transoil, Jersey, is a foreign corporation which is based overseas and had a contract with station terminals for the blending of fuel oil.

Transoil U.S.A. is a company because of export restrictions the United States government, all exports from United States of these types of products had to be done

in an United States based company. The contract was made with Transoil U.S.A. or one of the Plaintiffs, and the financing of this agreement was provided by Transoil, Jersey. The ultimate receiver, Transoil, U.S.A. was to purchase the luau and to sell it to Jersey down the line. Transoil, Jersey provided the financing, opened the letters of credit for the benefit of U.S.A., but didn't handle the financial aspects of the deal and they did this, with a name I can't pronounce—

MR. GREEN: James Chaleau in Madrid, Spain. The actual agreement was between U.S.A. and Empire.

THE COURT: Which one do you want judgment entered against?

MR. GREEN: U.S.A.

THE COURT: Is that because they haven't any money?

MR. GREEN: Nobody has any money. The money in Switzerland belongs to Paribas.

THE COURT: You have an obligation to repay it. The Swiss court has something tied up. Whose money is it?

[13]

MR. GREEN: This is money that was loaned by Paribas to Transoil, Jersey, or maybe another Transoil company.

THE COURT: I think Transoil, Jersey and Transoil U.S.A., for the purpose of this lawsuit, are one and the same. U.S.A. is a straw man merely for the purpose of satisfying U.S. import and export regulations. They are one and the same.

All right. What else do we need to do?

MR. GREEN: I think we need to discuss damages. The Plaintiff is contending they are entitled to everything under the contract and I think since it is—

THE COURT: They haven't gotten anything out of you yet.

MR. GREEN: We haven't gotten anything from them, either.

THE COURT: That is by your choice, wasn't it?

MR. GREEN: I take it it would be a waste of time to argue the merits of the contractual agreement with the Court. I don't believe the agreement, from our perspective says quite what you have characterized it as saying in terms of what we're obligated to do. We think we complied with the contract. We nominated a vessel. We brought it in, made it available to load—

THE COURT: Which one are you talking about?

MR. GREEN: The Swatha, before January 31st, before the time limit.

[14]

THE COURT: What date was it nominated and when did they give notice of readiness?

MR. GREEN: I don't have it off the top of my head.

THE COURT: The 29th.

MR. THETFORD: Friday, the 27th.

MR. GREEN: The contract provided we could nominate a vessel. We did nominate the vessel and we ran

into the same problems we did with the Jalinga. At no time did Rex tender cargo to us, Rex or Empire, I should say, which is who we had the agreement with.

THE COURT: I understand your position.

MR. THETFORD: The nomination of the Swatha assumes the mere nomination to be sufficient. We don't get paid by production of the bills of lading. We didn't consent to the nomination. We felt the nomination was an attempt to deceive the Plaintiff and to modify the terms of the court order, the stipulation that we entered and in fact that's the basis for which the Defendants claim a reason for ordering their bank not to pay. The nomination of Swatha, if you take the transaction as an entirety, appears to arise to a farud. They are nominating a vessel that could not carry the cargo and, in fact, the nomination was withdrawn before it was ever effective or if under Swiss laws the nomination would modify the letter of credit, which is not the fact, it wouldn't have been valid anyway.

[15]

THE COURT: Well, I will look at the transcript. I kind of skipped over the figures that Mr. McDonald testified to. What do you say you are out?

MR. THETFORD: We are out the contract proceeds, the letter of credit which is one million two hundred and forty thousand dollars.

THE COURT: What would you have gotten out of it?

MR. THETFORD: Myself?

THE COURT: Your client.

MR. THETFORD: Empire would get a million two hundred and forty thousand.

THE COURT: What would you have had to pay to Arco?

MR. THETFORD: Five hundred and thirty-seven thousand and some change.

THE COURT: Have you paid it?

MR. THETFORD: No, sir.

THE COURT: Then you're not out a million two.

MR. THETFORD: No, but we will have to pay them.

THE COURT: Where is the eighty thousand barrels of luau?

MR. THETFORD: Fifty-nine thousand is in Transoil's terminal, the balance is at Paktank. At the point we tendered the documents and title to all eighty thousand to the Defendants at their bank and they refused it—

THE COURT: But you gave up the fifty-nine thousand

[16]

when you made the agreement of January 10th.

MR. THETFORD: It's a new eighty thousand.

THE COURT: So none of your stuff is at the station, it's somewhere else. I'm talking about the contract—I'm going to hold that the contract of January 10th, that was the one that was breached. So, what are you out?

MR. THETFORD: Right.

THE COURT: You weren't ever going to take possession of the stuff?

MR. THETFORD: No.

THE COURT: It was irrevocably transferable letter of credit and when Transoil drew on it for which you had agreed to on the downward price, what was left would go to you or your clients.

MR. THETFORD: Yes, sir.

THE COURT: How much is that?

MR. THETFORD: I would need to figure it out, if you would just give me a moment.

Your Honor, if we recover the broker's fees of that million two hundred and forty thousand we'd be entitled to seven hundred and two thousand six hundred dollars. I may point out, however, I believe it's Arco's position we had the obligation to pay them. In other words, they were a party to the contract. They have now dropped out. If we get paid the entire amount, we have to turn around and pay Arco for the

[17]

cargo.

THE COURT: They've got to give you your stuff.

MR. THETFORD: They gave it to us.

THE COURT: You own it now?

MR. THETFORD: No, the warehouse receipts which represent title to that and ownership—

THE COURT: They're in a vault in Switzerland?

MR. THETFORD: They're endorsed to the Bank Paribas for the benefit of the Defendants. We don't have those. We passed the cargo, in effect—

THE COURT: Surely you don't have to pay for something you don't have and not going to get it?

MR. THETFORD: We took it.

THE COURT: Have you tried to sell it to anyone else?

MR. THETFORD: We can't. It's in the custody of the Swiss court pending the outcome of this lawsuit. It is sequestered and Arco executed, or ordered the bank to negotiate the warehouse receipt to Empire who in turn endorsed it over to Bank Paribas and the Defendants and that has been the problem. The right to possess and own that cargo is sitting in the banks tied up over there. We couldn't sell it to anyone else.

MR. GREEN: I believe Your Honor sent the Plaintiffs to Switzerland to sue under the letters of credit, sue the bank and recover under Swiss commercial law. So, I don't think

[18]

the bills of lading make any difference. If we breached the contract, then we breached the contract and the common law says the damages are loss of the benefits the bargaining of the contract.

THE COURT: That's the profit they made in their trade.

MR. GREEN: Plus any expenses.

THE COURT: And of course they have a duty to mitigate and they caused the bills of lading to go into that bank.

MR. GREEN: That's right and as I understand it,

they have not paid the storage charges on the cargo to Paktank and Paktank has exercised some sort of warehouseman's lien and has taken the cargo back.

MR. THETFORD: We're asking you award us the full price of the contract and order that the warehouse receipts be delivered to the Defendants. That was the deal and that's what the Swiss Court would honor.

THE COURT: You're asking for specific enforcement. Does that work in a situation such as this? Is this such a unique transaction with non real property which would warrant specific enforcement?

MR. THETFORD: I think so. It is the case, Your Honor, of involving conflict of laws. It's a case involving international letter of credit. It is a case where we have

[19]

the personal property under sequestration by a court of the country of Switzerland awaiting your order as to what to do with it.

MR. GREEN: I don't know why they're awaiting your order as to what to do with it. With the documents, as I understand it they have, they could dismiss Paribas on the basis of a court of non-convenience and they have a remedy. If Arco is so concerned about getting the money, they could have intervened in this suit and sued for the breach of the contract between Rex and Arco and they haven't done it.

I think the only thing before this Court is just plain old vanilla breach of contract where common law contract damages ought to apply.

THE COURT: I don't believe this is a specifically enforceable thing where you can say you pay them or give them their receipts. For one thing, too, they're not in a position of giving us the benefit of that bargain either, I don't believe. They haven't got the cargo or control of the cargo.

Is that another lawsuit?

MR. GREEN: I hope not.

MR. THETFORD: We are in a position to give them the warehouse receipts, which they are entitled to. We may not be able to give them the cargo, because Paktank has imposed a lien, but that is their problem, because their bank didn't pay. Under the agreement we were obligated to pay the storage up to

[20]

January 31st. We paid for that. It's only since then that the storage fees have not been paid. Had they honored the agreement, had they accepted the warehouse receipts when tendered and ordered the bank to pay us, they would have been entitled to come in and pick up their cargo at any point from that day on. Their dishonor of the agreement is what caused all the damage. Once we passed the documents we had no control over those documents such as we could mitigate any damages.

THE COURT: What would happen if I were to enter judgment for the Plaintiffff for its loss of bargain, namely, what it would have made had the deal gone through then what would happen? Where would that leave the parties?

MR. GREEN: I think the Plaintiff would still have one or more proceedings pending in Switzerland. To the

extent they collect any money off of the Transoil Defendants that you render judgment against, I think that would be an offset to any recovery they would get against the bank, if they had one. They're only entitled to one satisfaction, not a double judgment.

So, if the Court has determined, and I don't want to be on the record as saying we acknowledge we breached the contract, but if you determine it is a breach of contract, I think that that is the appropriate thing to do, just enter judgment for the damages.

Arco's position is they sold the stuff and it's

[21]

out there in Paktank somewhere.

MR. GREEN: I believe, Your Honor, and this is all hearsay, but I think Arco has a deal with Paktank. They've got control over the cargo anyway. So, if Arco can sell to somebody else, I think the title to the property has been cleared up through Paktank's enforcement of its warehouseman's lien so that they can mitigate their damages by selling it to somebody else and indeed Arco may have a lawsuit against Rex and Empire but to my knowledge they haven't filed one yet so I don't think we ought to be concerned about them until suit is filed.

THE COURT: Is there enough evidence in the record from which I could figure out what is the amount of your loss?

MR. THETFORD: Yes, Your Honor. Mr. Sudrow, the Rex Oil individual could testify if you wish.

THE COURT: The evidence is closed. Is there enough in the record from which I can reasonably determine.

MR. THETFORD: If you take the letter of credit from Paribas to Empire and subtract from that the other letter of credit from Empire to Rex and Arco you will arrive at the brokerage fee which is seven hundred and three thousand dollars, about, and in addition to that as damages we would ask you to award us the one dollar per barrel discount granted on the agreement of January 10th which amounts to eighty thousand dollars, plus pre-judgment interest. It's been about fifteen

[22]

or sixteen months now and the related Swiss legal fees, to sequester the funds which, by the way, are Transoil's funds, not the bank's funds.

Mr. McDonald testified there was one hundred and fifty thousand.

Mr. Ryniker's fees and mine to date have been about fifty thousand. We would ask you award us those monies also.

THE COURT: Whatever happened to the standby letter of credit of two hundred and thirty-five thousand?

MR. THETFORD: It was never cashed. The premium for that was fifty thousand dollars and that evening of January 10th we dissolved the standby letter of credit. It was vacated. However, we still paid a premium of fifty thousand dollars.

THE COURT: There was a hundred and sixty thousand dollars in freight and other stuff?

MR. THETFORD: That was to compensate Transoil—

MR. GREEN: The standby letter of credit was to

compensate Transoil in the event that the Plaintiffs forfeited again or did not comply again, the second time we brought a ship in. Which was the Jacinth. The discount Mr. Thetford is trying to collect, the dollar per barrel discount was intended to compensate Transoil or the Transoil entities for the damages they had suffered out of the Jalinga episode. So,

[23]

these items are now all wrapped up in the new contract as part of the agreement. As the Court said, there were considerations back and forth.

THE COURT: Have you filed proposed findings and conclusions?

MR. THETFORD: I filed pretrial findings. If you wish post trial I will.

THE COURT: I'm going to enter judgment for the Plaintiff. I think I have exposed my basic reasoning for doing that. I will have to file detailed findings and conclusions and we will do so before Mr. Daley leaves.

Is there anything anyone else needs to bring up.

I really think you're right, Mr. Green, all of these discounts, etc., etc., renegotiation and price and all that, that was wrapped up and would I conceive this lawsuit to be about on the breach by your client of the agreement of January 10th, which I am convinced was a maritime contract.

MR. THETFORD: We reurge our position we receive prejudgment interest and post judgment interest on our attorney fees, particularly in view of the fact we had to

resort to extraordinary legal proceedings to reinforce our rights under the contract. I believe under Texas law and under the 5th Circuit law under the exigent circumstances you are allowed to award attorney fees in a maritime matter.

THE COURT: Attorneys fees as damages?

[24]

MR. GREEN: I might not argue about this conceptionally. I think if the Court does award attorney fees, the Court has to make a determination of what they are based on the factors on the Railway Express case and other cases and there is not any evidence in this case upon which a Court can make a determination, especially as to the fees incurred in Switzerland.

THE COURT: At this moment I am disinclined to allow attorneys fees. The 5th Circuit, if I recall is fairly clear that prejudgment interest is pretty much expected in admiralty cases.

I think the award of attorneys fees as damages would require a set of facts where the party against whom those fees are to be levied have engaged in some conduct, taking a position that wasn't really warranted where it should have rolled over at the beginning. I don't know if that's the law, but if it's not, that's what it ought to be. I am very disinclined at this moment to consider the award of attorney fees as damages.

MR. THETFORD: It is our position that the agreement on January 10th and subsequent attempt to nominate the selective as to novate the terms of the agreement, followed by the instructions of the bank not to

honor it amounts to bad faith sufficient to warrant an award of attorney fees.

THE COURT: I understand your position at this point and I don't think they are that bad of guys.

[25]

Thanks for coming over.

(PROCEEDINGS CONCLUDED)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CERTIFICATE OF REPORTER

I, WALTER R. LAUCKNER, Official Court Reporter, United States District Court, Southern District of Texas, appointed pursuant to the provisions of Title 28, United States Code, Section 753, do hereby certify that I reported the proceedings had in the above styled and numbered cause, and that said proceedings was later reduced to typewriting under my personal supervision, and the above and foregoing pages constitute a true and correct transcript thereof.

Given under my Official Hand this 30th day of July, 1987.

/s/ WALTER R. LAUCKNER
Walter R. Lauckner
Official Court Reporter

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO: H-86-103

REX OIL, LTD. and EMPIRE
PETROLEUM INTERNATIONAL, INC.,
Plaintiffs

v.

M/V JACINTH, her engines, tackle, etc., 80,000 barrels of oil aboard the M/V JACINTH and/or in tanks 728/735 of PAKTANK CORP., warehouse receipts for said 80,000 barrels of oil, Ocean Bills of Lading for said 80,000 barrels of oil *in rem,*

-and against-

A/S KOSMOS, PAKTANK CORP., ARCO CHEMICAL COMPANY, TRANSOIL (JERSEY) LTD., AND TRANSOIL U.S.A., INC.,
Defendants

(Filed February 21, 1986)

AGREED ORDER

On the 10th day of January, 1986, came on to be heard the Joint Motion of Plaintiffs, REX OIL, LTD., and EMPIRE PETROLEUM INTERNATIONAL, INC. alleged to be cargo owners of a certain quantity of cargo aboard the M/V JACINTH, and in certain shore tanks

at Paktank Terminal, Deer Park, Texas, and defendants Transoil (Jersey) Ltd. and Transoil U.S.A., Inc. (hereinafter "transoil"), and defendants M/V JACINTH, A/S Kosmos, and Paktank Corporation having appeared through counsel at said hearing, and having stated no opposition to the agreement hereinafter set forth, the said motion concerning release from seizure of the cargo which was seized by the United States Marshal on January 9, 1986. The parties are in agreement that the cargo currently under seizure, the bills of lading, the warehouse receipts and cargo in shore tanks 728 and 735, Paktank Terminal, may be and has been released by order of this Court dated January 10, 1986.

As conditions of said order of release, plaintiffs and Transoil have agreed upon the following terms and condition:

1. Plaintiffs agree to dismissal of any *in rem* causes of action claimed herein against the aforesaid cargo, bills of lading and warehouse receipts; specifically reserving any and all *in personam* causes of action, rights or remedies of all parties to this cause that are or may be available to said parties;

2. Transoil agrees to amend the existing letter of credit between Transoil and plaintiffs, or either of them, Paribas Letter of Credit Number 53.750/C4, on or before 10:30 hours E.S.T., January 13, 1986, to reflect the following terms and conditions agreed to by and between plaintiffs and Transoil:

a. Transoil will purchase from plaintiffs a quantity of 80,000 bbs. of Luwa Distillate Blend Stock at an agreed price of $15.50 per bbl;

b. All references to specific tank numbers at Paktank Terminal, Deer Park, Texas will be deleted;

c. Transoil will nominate a vessel to lift the cargo from Paktank Terminal, Deer Park, Texas, said lifting to be completed no later than January 31, 1986;

d. If Transoil does not nominate a vessel able to lift the cargo by January 31, 1986, plaintiffs may present negotiable warehouse receipts and obtain full payment for the said 80,000 bbls. under the above described letter of credit.

3. Transoil agrees to release immediately Dow Banking Corporation standby letter of credit number 22290, in the sum of $235,000.00;

4. Transoil agrees that the specifications of the 80,000 bbls. of Luwa Distillate Blend Stock, to be purchased from plaintiffs, may vary within standard industry limits, but it shall be Luwa Distillate Blend Stock, as produced by Arco Chemical Company;

5. Transoil agrees that no claim will be made against plaintiffs on the basis that the material has an EPA hazardous waste warning.

6. The bills of lading for the cargo which was seized aboard the M/V JACINTH on January 9, 1986 shall be issued to Chesham.

IT IS SO ORDERED.

SIGNED AND ENTERED this 21st day of February, 1986.

/s/ ROSS N. STERLING
United States District Court

APPROVED AS TO FORM AND ENTRY REQUESTED:

/s/ JACK P. THETFORD, JR.
Jack P. Thetford, Jr.
Attorney in charge for plaintiffs
REX OIL LTD. and EMPIRE PETROLEUM INTERNATIONAL INC.

/s/ TOBI A. TABOR
Tobi A. Tabor
Attorney in charge for defendants
TRANSOIL (JERSEY) LTD. and TRANSOIL U.S.A., INC.

/s/ ANTOINETTE J. van HEUGTEN
Antoinette J. van Heugten
Attorney in charge for M/V JACINTH

/s/ MICHAEL K. BELL*
Michael K. Bell
Attorney in charge for defendant
PAKTANK CORP.

* Signed by permission.

APPENDIX G

WARRANT OF SEIZURE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS

THE PRESIDENT OF THE
UNITED STATES OF AMERICA

To the Marshal of the Southern District of Texas—
GREETING:

WHEREAS, a Libel hath been filed in the United States District Court for the Southern District of Texas, on behalf of REX OIL LTD., EMPIRE PETROLEUM INTERNATIONAL, INC. against M/V JACINTH, her engines, tackle, etc., et al., for reasons in the said Libel mentioned, and praying the usual process and monition of the said Court in that behalf to be made, and that all persons interested in the said 80,000 barrels of oil now aboard the M/V JACINTH, or in shore tanks 728 and 725, at Paktank Terminal, Deer Park Terminal, 2759 Battleground Road, Deer Park, Texas, and the ocean bills of lading or warehouse receipts for said cargo, may be cited in general and special to answer the premises, and that all due proceedings being had that the said 80,000 barrels of oil and the ocean bills of lading or warehouse receipts for said oil may, for the causes in the said Libel mentioned, be condemned, and the proceeds thereof distributed.

YOU ARE THEREFORE HEREBY COMMANDED to attach the said 80,000 barrels of oil and the ocean

bills of lading or warehouse receipts for said oil and to detain the same in your custody until the further order of the Court respecting the same.

HEREIN FAIL NOT, and of this writ make due return, forthwith, and what you shall have done in the premises.

WITNESS, the Honorable ROSS N. STERLING, Judge of the said Court, and the seal thereof, at Houston, Texas, in said District, this 9th day of January, A.D. 1986 and of American Independence the 210th year.

/s/ Jesse E. Clark
Clerk, U.S. District Court,
Southern District of Texas

By /s/ Deputy

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

NO. H-86-103

REX OIL, LTD. and EMPIRE
PETROLEUM INTERNATIONAL, INC.,
Plaintiffs

v.

M/V JACINTH, her engines, tackle, etc., 80,000 barrels of oil aboard the M/V JACINTH and/or in tanks 728/735 of PAKTANK CORP., warehouse receipts for said 80,000 barrels of oil, Ocean Bills of Lading for said 80,000 barrels of oil, *in rem,*

-and against-

A/S KOSMOS, PAKTANK CORPORATION, ARCO CHEMICAL COMPANY, TRANSOIL (JERSEY) LTD., AND TRANSOIL U.S.A., INC.,
Defendants

(Filed January 9, 1986)

COMPLAINT

TO THE HONORABLE JUDGE OF SAID COURT:

The complaint of Rex Oil, Ltd. and Empire Petroleum International, Inc., requesting production of cargo and/or documents of title owned by plaintiffs, and preliminary

injunction against M/V JACINTH, her engines, etc. 80,000 barrels of oil aboard the M/V JACINTH, and/or warehouse receipts and/or ocean bills of lading, *in rem*, and against A/S KOSMOS, PAKTANK CORPORATION, *in personam*, in a breach of a maritime contract, tortious conversion of cargo and tortious interference with legal contract, the same being an admiralty or maritime claim within the meaning of Rule 9(h), alleges on information and belief as follows:

I.

At all times hereinafter mentioned, plaintiff, Rex Oil, Ltd. (hereinafter "REX") was and now is a corporation or other business entity, having its principal office and place of business in a foreign country.

At all times hereinafter mentioned, plaintiff Empire Petroleum International, Inc. (hereinafter "Empire") was and now is a corporation or other business entity, having an office and place of business at 258 Elm Street, New Canaan, Ct. 06840.

II.

Defendant A/S KOSMOS, is a foreign corporation engaged in the maritime industry with its principal place of business in a place other than the State of Texas and at all times hereinafter mentioned, was the owner of the M/V JACINTH, and can be served in care of Anders Jahre, as Managers at Strand Promenaden 9 Postboks 2006, 3201, Sandefjord, Norway.

Defendant PAKTANK CORPORATION, is a Delaware corporation with its principal place of business in the State of Texas, and at all times hereinafter mentioned,

was in the business of public warehouseman, and has an agent for service of process within this District, C.T. Corporation Systems, Inc., at 811 Dallas St., Houston Texas 77002.

Defendant ARCO CHEMICAL CO., is a foreign corporation with its principal place of business in a place other than the State of Texas, can be served at 1500 Market St., Philadelphia, Penn. 19102 and, at all pertinent times hereinafter mentioned, was the seller of the cargo herein.

Defendant TRANSOIL (Jersey) Ltd., is a foreign corporation with its principal place of business in a place other than the State of Texas. Defendant TRANSOIL U.S.A. Inc., is a foreign corporation with its principal place of business in a place other than the State of Texas, can be served in care of its Agent Seagulf Maritime, Inc., at 806 Waugh Drive, Houston, Texas 77019.

III.

The M/V JACINTH was at all times material hereto a general vessel of foreign registry employed in the common carriage of cargo by water to various ports in the United States of America and in this District, and now is within the jurisdiction of this Court. The vessel may currently be found at PAKTANK terminal, Houston, Texas.

IV.

Defendant 80,000 barrels of oil, currently aboard the M/V JACINTH, or in shore tank numbers 728 and/or 735 at PAKTANK CORPORATION, are cargo owned

by the plaintiffs, pursuant to a contract of sale between plaintiffs and defendant ARCO.

V.

Defendant warehouse receipts are those negotiable documents of title representing ownership to the above-said cargo.

VI.

Defendant ocean bills of lading are those negotiable documents of title representing ownership of the above-said cargo.

VII.

A contract of sale was entered into between plaintiffs, as buyers, and defendant ARCO, as sellor, whereby said defendant is now obligated to deliver said cargo, or documents of title to said cargo, pursuant to contract and by operation of law.

VIII.

Despite repeated requests for such documents, defendants have failed to produce the cargo, warehouse receipts and/or bills of lading, thus tortiously converting plaintiffs' goods, without payment and tortiously interfering with plaintiffs' legal contracts.

IX.

Plaintiffs have entered contracts to resell said cargo, and defendants continued refusal to deliver said cargo and/or documents of title will cause irreparable harm.

X.

For the harm and damage done to plaintiffs, and for the harm and damage that will continue but for the intervention of this Court, plaintiffs have no adequate remedy at law. Such damages are continuing and to a large degree intangible. Plaintiff respectfully requests that this Honorable Court order defendants one or all of them, to tender to plaintiffs the cargo or such documents of title to said cargo. Plaintiffs cannot identify the current possessor of such documents.

XI.

Upon information and belief, the vessel is preparing to depart this jurisdiction for a foreign destination, with plaintiffs' cargo onboard, therefore removed forever from plaintiffs' control. Such exigent circumstances, such as the vessels' immediate departure, may make a pre-seizure hearing by the Court impracticable, and plaintiffs certify that the facts hereunder support immediate issuance, by the Clerk of Court, of a Warrant of Arrest.

XII.

Defendants continued refusal to deliver said cargo and/or documents of title constitutes a breach of contract, breach of bailment, intentional tortious conversion, intentional tortious interference with other contracts of plaintiffs, and does not conform with justice and equity, all resulting in monetary loss to plaintiffs in the sum of $1,500,000.00.

XIII.

All singular the premises are true and within the

admiralty and maritime jurisdiction of the United States and of this Honorable Court.

WHEREFORE, plaintiff prays:

1. That a preliminary injunction be issued to defendants ordering the defendants, one, both or all of them, to tender the cargo, warehouse receipts and/or ocean bills of lading for 80,000 barrels of oil owned by defendants now onboard the M/V JACINTH or in short tanks 728 and 735 at PAKTANK terminal, Houston;

2. That process in due form of law according to the practice of this Court in causes of admiralty and maritime jurisdiction may issue against said cargo, and/or documents of title, whether they be onboard said vessel, or not, and that all persons having or claiming any interest therein be cited to appear and answer under oath all and singular the matters aforesaid, and this Court will be pleased to pronounce a judgment in favor of plaintiffs for their said damages, together with interest, costs and disbursements, and;

3. That this Court will grant to plaintiffs such other and further relief as may be just and proper.

/s/ JACK P. THETFORD, JR.
Jack P. Thetford, Jr.
Attorney in Charge for Plaintiff
3100 Edloe, Ste. 306
Houston, Texas 77002
(713) 622-5829

Of Counsel:

RYNIKER & THETFORD

THE STATE OF TEXAS §
§
COUNTY OF HARRIS §

Jack P. Thetford, being duly sworn, deposes and says:

He is an attorney and member with the firm of RYNIKER & THETFORD attorneys for plaintiff herein; he has read the foregoing complaint and knows the contents thereof; and that the same is true to his own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters, he believes it to be true.

The reason this verification is made by deponent and not by plaintiff is that plaintiff is a corporation, none of whose officers are now within this District.

The sources of dependent's information and the grounds for his belief as to those matters stated in the complaint, to be alleged on information and belief, are documents and records in his files.

/s/ JACK P. THETFORD

SUBSCRIBED AND SWORN TO BEFORE ME, the undersigned authority, this 9th day of January, 1986.

/s/ SUSAN GERHART
Notary Public, State of Texas
My Commission Expires 9-24-86